

E. The Carriers' Interest in Nondisclosure Outweighs the CPUC's or the Commission's Interest in Including the Redacted Data in Its Record.

CCAC and several of the cellular carriers, including BACTC, argued strenuously in their oppositions to the CPUC Petition that the Commission should not consider the redacted portions of the CPUC Petition in reaching its decision in this proceeding. These arguments were premised on fundamental considerations of procedural fairness and due process. See CCAC Motion at 8-12, 14; BACTC Opposition, at 6, 9; Opposition of AirTouch Communications to Request of NCRA for Access to California Petition for State Regulatory Authority Pursuant to the Terms of Protective Order, filed September 29, 1994 ("AirTouch Opposition"), at 2, 9. Neither CCAC nor the carriers desired disclosure of the redacted information. To the contrary, they made clear that for cellular carriers to obtain access to these types of confidential information about their competitors would pose serious risks of antitrust liability. See CCAC Motion, at 15-17; CCAC Opposition, at viii; AirTouch Opposition, at 2. However, the carriers expressed strong opposition to the Commission's consideration of the large quantities of data and entire paragraphs of argument included only in the copies of the CPUC Petition provided to the Commission itself. Significantly, the CPUC has not established that any of the still redacted information is necessary for the Commission to reach its decision on the CPUC Petition. It has not been shown that this information is a "necessary link in the chain

of evidence that will resolve a public interest issue." Western Union Telegraph Co., 2 FCC Rcd. 4485, 4487 (1987).

In its request for confidentiality accompanying the Petition, the CPUC offered no reason why the redacted data was needed for the Commission to develop a full record or to reach a well-reasoned decision. Even in its Opposition to the CCAC Motion, the CPUC does not discuss specifically how each type of data (number of subscribers per carrier and per rate plan, capacity utilization rates, market share percentages) is relevant to the presentation of its case. In fact, the redacted data is not important to the CPUC's presentation nor to the Commission's record.

First, as the CPUC admitted by its September 13 letter, much of the data which was redacted is in fact publicly available and should not have been redacted in the first place. Despite the CPUC's efforts to limit its redactions, there is still much redacted data which has already been made public and need not be the subject of continuing dispute in this proceeding. For example, the CPUC's ALJ ruled that information about the carriers' 1989 through 1991 operations need not be treated as confidential. See ALJ's Rulings of July 19, 1994, and August 8, 1994.

Second, much of the data in the appendices to the CPUC Petition is not referenced or used in any way in the Petition itself and appears to provide no important support for any of the CPUC's factual or policy assertions. For example, Appendix J to the Petition sets forth the actual number of subscribers on each

rate plan of each of the carriers. This is among the most sensitive of all the confidential data subject to redaction. This data is not analyzed or used in any manner in the Petition; all the CPUC does with the number of rate plan subscribers is to state the percentage of subscribers on the Basic rate plan, a figure since made public by the CPUC's June 13 letter. See Petition, at 41. Similarly, Appendix G, which includes the total number of subscriber on a carrier's system, is referenced only once, regarding the Santa Barbara market, in a context in which the number of subscribers is neither a key nor a controversial factor. See Petition, at 48.

Third, as the CCAC Opposition demonstrates, a full record can be provided on the basis of publicly available information and by aggregating data on a statewide basis so that the confidentiality of carrier-specific data is preserved. The CPUC has done this in several instances, as in its discussion of the percentage decline in operating expenses per subscriber. See Petition, at 35. The same could be done with the CPUC's assertion, at pages 29-31, that resellers' market shares have declined substantially while carriers' shares have remained constant. To support this assertion the CPUC could have aggregated state- or market-wide data, while preserving the confidentiality of carrier-specific market share information.

The Commission should conclude that the CPUC has failed to meet its burden of establishing the need to use the redacted data. Absent such data, the Commission has an ample record on which to base its decision.

VI. CONCLUSION

BACTC respectfully requests that the Commission deny NCRA's Request for Access and withhold from all parties access to all data still redacted from available copies of the CPUC Petition. Accordingly, BACTC urges that the Commission itself not consider the redacted data in its review of the CPUC Petition and return all unredacted versions of the Petition to the CPUC.

Respectfully submitted,

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October 4, 1994

GENERAL ORDER NO. 66-C
(Supersedes General Order No. 66-B)

**PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA**

**PROCEDURES FOR OBTAINING INFORMATION AND RECORDS IN THE
POSSESSION OF THE COMMISSION AND ITS EMPLOYEES AND COMMISSION
POLICY ORDERS THEREON.**

Adopted June 5, 1974; Effective June 5, 1974.
Resolution No. L-151.

Amended June 25, 1974; Effective June 25, 1974.
Resolution No. DE 120.

Amended May 4, 1982; Effective May 4, 1982.
Resolution No. L-224.

1. DEFINITIONS

- (1.1) "Public records" of the Public Utilities Commission, includes all items encompassed in Section 6252 of the Government Code,¹ except as otherwise excluded by this General Order, statute, or other order, decision, or rule.
- (1.2) "Commission" means the Public Utilities Commission and the staff of the Public Utilities Commission.

2. EXCLUSIONS

Public records not open to public inspection include:

- (2.1) Records or information specifically precluded from disclosure by statute. (E.g.: accident reports, P.U. Code § 315)²
- (2.2) Records or information of a confidential nature furnished to,

¹ Gov't Code § 6252 (d) and (e):

"(d) 'Public records' includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

"(e) 'Writing' means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents."

² P.U. Code § 315:

"The commission shall investigate the cause of all accidents occurring within this State upon the property of any public utility or directly or indirectly arising from or connected with its maintenance or operation, resulting in loss of life or injury to person or property and requiring, in the judgment of the commission, investigation by it, and may make such order or recommendation with respect thereto as in its judgment seems just and reasonable. Neither the order or recommendation of the commission nor any accident report filed with the commission shall be admitted as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property. Every public utility shall file with the commission, under such rules as the commission prescribes, a report of each accident so occurring of such kinds or classes as the commission from time to time designates."

or obtained by the Commission. (See P.U. Code §§ 583, 3709, 5228) ³

Such records or information shall include, but not be limited to:

- a) Records of investigations and audits made by the Commission, except to the extent disclosed at a hearing or by formal Commission action.
 - b) Reports, records, and information requested or required by the Commission which, if revealed, would place the regulated company at an unfair business disadvantage.
 - c) Reports, records, and information provided to the Commission for compilation and use in connection with the Commission's Data Bank program.
 - d) Records or information furnished to the Commission pursuant to the Highway Carriers' Uniform Business License Tax Act (P.U. Code §§ 4301, *et seq.*) and the Transportation Rate Fund (P.U. Code §§ 5001, *et seq.*).
 - e) Reports pursuant to General Order No. 107-A, pertaining to privacy of telephone communications.
- (2.3) Intra-agency notes, drafts, memoranda and other communications not otherwise made public by the Commission.
 - (2.4) Non-public communications with other public agencies or officers where the public interest in withholding such records clearly outweighs the public interest in disclosure.
 - (2.5) Personnel records, other than present job classification, job specification and salary range.
 - (2.6) Test questions, scoring keys and other examination data used to administer licensing examinations.
 - (2.7) Records received from or furnished to the Governor or the Governor's office.
 - (2.8) Information obtained in confidence from other than a business regulated by this Commission where the disclosure

³ P.U. Code § 583:

"No information furnished to the commission by a public utility, except such matters as are specifically required to be open to public inspection by the provisions of this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any officer or employee of the commission who divulges any such information is guilty of a misdemeanor."

P.U. Code § 3709:

"Any employee of the commission who divulges any fact or information which comes to his knowledge during the course of the examination of the accounts, records, and memoranda of highway carriers, except as he is authorized or directed by the commission or by a court of competent jurisdiction or judge thereof, is guilty of a misdemeanor and is punishable by a fine of not more than five hundred dollars (\$500) or by imprisonment in the county jail for not more than three (3) months, or both."

P.U. Code § 5228:

"Any employee of the commission who divulges any fact or information which comes to his knowledge during the course of the examination of the accounts, records, and memoranda of household goods carriers, except as he is authorized or directed by the commission or by a court of competent jurisdiction or judge thereof, is guilty of a misdemeanor and is punishable by a fine of not more than five hundred dollars (\$500) or by imprisonment in the county jail for not more than three (3) months, or both."

would be against the public interest. (E.g.: Evidence Code, § 1040) ⁴

3. PROCEDURE FOR EXAMINING AND OBTAINING PUBLIC RECORDS

(3.1) INITIAL REQUESTS

Requests to examine and/or copy public records should be made to the Secretary of the Commission, who is the official Custodian of Records. Service of process for records should be made on the Secretary. Assistant Secretaries in the Los Angeles and San Francisco Offices of the Commission are authorized to receive requests and service of process for the Custodian of Records. Public records may be examined and copied and service of process may be made at the Commission's offices in San Francisco and Los Angeles during regular office hours.

(3.2) FEES FOR COPIES

Certified copies of public records may be obtained from the Secretary's office in San Francisco or the Assistant Secretary's office in Los Angeles. Fees for copies or certified copies are as set forth in Public Utilities Code § 1903.⁵ Checks for payment should be made payable to the Public Utilities Commis-

⁴ Evidence Code § 1040:

"(a) As used in this section, 'official information' means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

"(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:

"(1) Disclosure is forbidden by an act of Congress of the United States or a statute of this state; or

"(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; [but not privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding.] In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered." (Stats. 1965, c. 299, § 1040.)

⁵ P.U. Code § 1903:

"The commission shall charge and collect the following fees:

(a) For copies of papers and records not required to be certified or otherwise authenticated by the commission (except transcripts of testimony, other evidence or proceedings prepared by or under the direction or supervision of the official reporters of the commission), twenty cents (\$0.20) for each folio.

(b) For certified copies of official documents and orders filed in its office, twenty-five cents (\$0.25) for each folio and one dollar (\$1) for every certificate under seal affixed thereto.

(c) For certifying a copy of any report made by a public utility, two dollars (\$2).

(d) For each certified copy of the annual report of the commission, one dollar and fifty cents (\$1.50).

(e) For certified copies of evidence and proceedings before the commission (except transcripts of testimony, other evidence or proceedings prepared by or under the direction or supervision of the official reporters of the commission), twenty-five cents (\$.25) for each folio.

The commission may establish and fix the charge to be made and collected by it for transcripts of testimony, other evidence and proceedings taken before the commission, where such transcripts are prepared by or under the direction or supervision of the official reporters of the commission."

sion of the State of California.

(3.3) TIME TO REVIEW REQUEST

Persons desiring to inspect, subpoena, or copy public records in the Commission's possession must allow sufficient time for the records to be assembled and reviewed for the purpose of determining if they are public records which fall within the exclusions listed in Section 2 above, or if there is some public interest served by withholding the records. This review will be made in the Commission's offices in San Francisco. Requests for Commission records must take into account the time necessary to have the file reviewed in San Francisco before it may be released.

(3.4) APPEAL TO FULL COMMISSION

A person wishing to review records which are not open to public inspection may write to the Secretary in San Francisco, indicating the records being withheld, and stating the reasons why these records should be disclosed to him. Sufficient time must be allowed for the full Commission to review this request and the applicable records.

(3.5) HEARINGS OR PROCEEDINGS

During the course of a hearing or proceeding before the Commission, the Commission, or a Commissioner or an Examiner may, for good cause shown, authorize or direct a Commission employee to produce or divulge information or public records not open to public inspection, or to make it available for inspection, or to furnish, and certify, if requested, a copy or copies thereof to the person making such request, or to testify with respect to the matter described in such request.

4. COMMISSION POLICY

(4.1) ORIGINAL RECORDS:

Availability of original records is necessary for the conduct of the Commission's duties. Evidence Code §§ 1560, *et seq.*, provide for the admissibility into evidence of true copies of records such as are maintained by the Commission. The personal appearance of the Custodian of Records is not required. A subpoena demanding original Commission records or personal appearance of the Custodian of Records is an unwarranted interference with the Commission in the performance of its official duties and will be resisted.⁶

(4.2) EXPERT WITNESSES:

It is not the duty of the Commission to provide its staff members to litigants as expert witnesses. The Commission does not have sufficient personnel to provide this service and perform its legitimate duties. Therefore, the Commission will resist subpoenas requiring Commission personnel to testify as experts.

Should a Commission employee be required by subpoena to attend a proceeding or deposition for the purpose of giving expert testimony, the minimum compensation for such attendance is hereby set at \$500 plus travel and per diem expenses for each day or part thereof that the Commission is deprived of his services. Checks for payment should be made payable to the Public Utilities Commission of the State of California.

U. Code § 1750:

"No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases."

Issued at San Francisco this 5th day of June, 1974.

**PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

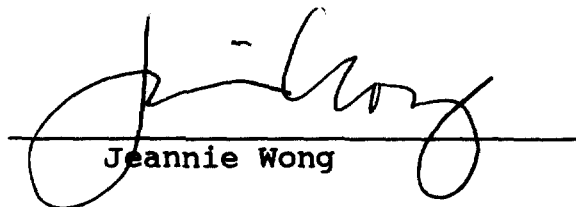
By William R. Johnson
Secretary

CERTIFICATE OF SERVICE

I, Jeannie Wong, certify that I have on this date caused the foregoing OPPOSITION OF BAY AREA CELLULAR TELEPHONE COMPANY TO REQUEST OF NATIONAL CELLULAR RESELLERS ASSOCIATION FOR ACCESS TO CALIFORNIA PETITION FOR STATE REGULATORY AUTHORITY PURSUANT TO THE TERMS OF A PROTECTIVE ORDER in the Matter of Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates to be served on the parties of interest in FCC PR Docket No. 94-105; PR File No. 94-SP3 by sending a copy by United States mail, first-class, postage prepaid, to all parties on the attached service list.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 4th day of October 1994, at San Francisco, California.


Jeannie Wong

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